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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~1037~~ 78

BARKER DUNCAN,

Petitioner,

vs.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SPRINGFIELD COURT OF APPEALS OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

JOHN MOBERLY,
Houston, Missouri;
SIZER & MYRES,
Monett, Missouri;
HARRY G. WALTNER, JR.,
Jefferson City, Missouri;
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 1037

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vs.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Barker Duncan, respectfully shows as grounds for the issuance of a writ of certiorari to the Springfield Court of Appeals of Missouri.

A.

Summary Statement of the Material Involved.

This is an action for damages under the Federal Employers' Liability Act (Title 45, Sec. 51, U. S. C. A.), for permanent bodily injuries suffered by the petitioner while acting within the scope of his duties as an employee of

appellant. The verdict of the jury on which the judgment of the trial court was rendered in the petitioner's favor is in words and figures as follows:

> "We, the Jury, find the issues for the plaintiff and we assess his recovery at $5,691, and we further find that on such judgment the defendant is entitled to the sum of $600 principal and $91 interest, and subtracting said $691 from the said $5,691, due plaintiff, the total due plaintiff is $5,000.
>
> (Signed) C. D. KELLER,
>
> (R. 2, 52, 96) *Foreman.*"

The Springfield Court of Appeals reversed outright the judgment and ordered the petitioner's suit dismissed (R. 106). The reversal of the petitioner's judgment was based solely upon the fact that the petitioner had failed to return, before suit, $600.00 which the appellant had loaned the petitioner under the following "device" and scheme, which petitioner contends is in violation of Title 45, Sec. 55, U. S. C. A.:

"Agreement

> On or about April 10th, 1936, while employed as Roundhouse Laborer at or near Nevada, Missouri, I was injured in the following manner: while working on and about engine No. 1429, I fell from the running board of this locomotive into the turntable pit and was then and thereby injured.
>
> I have this day received from the Trustee of the Missouri Pacific $600.00 Railroad Company the sum of $600.00, and also the additional sum of $—. I sustained personal injuries in an accident as above set forth, the effects and extent of which are uncertain. Both of said sums are paid to me at my request for living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of my claim against said Trustee for said injuries.

I agree that the payment of said sums of money to me shall not be considered as an admission of any liability on the part of said Trustee or the Railroad Company and I understand that the Trustee and the Railroad Company deny liability for my injuries.

In consideration of said payment of $600.00, I agree with said Trustee that I will endeavor, in good faith, to adjust and settle any claim I may have for my injuries without resorting to litigation, but I agree that if my claim is not so adjusted, and I elect to bring suit, I will first return the said sum of $660.00 to said Trustee and said return shall be a prerequisite to the filing and maintenance of any such suit. In consideration of said payment of $600.00, I covenant and agree with said Trustee and his successors that I will not commence suit against him, or them, or the Railroad Company, to recover damages for my said injuries in any courts except those sitting within the State where my injuries were sustained, or within the State where I resided at the time my injuries were sustained, and I covenant that I will not bring any such suit in any other court.

It is further agreed that the aforesaid sums of $600.00 and $— are the sole considerations for the respective agreements herein; that said considerations are contractual and not mere recitals; that no representations or promises of any kind or character, not specified herein, have been made to induce the execution of this agreement or with reference thereto, or the matters and facts above mentioned; that in executing this agreement it is agreed that I rely wholly upon my own judgment, belief and knowledge of the nature, extent and duration of said injuries as well as the liability questions involved, and that I have not been influenced to any extent whatever by any statements regarding said injuries or regarding liability or any other matters made by said Trustee or by any other person or persons representing or acting for him, or by any physician or surgeon by him employed; and that all agreements and understandings between the parties above named or hereinbefore referred to are embodied and expressed herein.

Audited: (Signed) C. B. Moon, Auditor Disbursements.

Approved for Payment (signed) T. M. Niven, General Auditor. CBM.

Received St. Louis, Missouri, August 13th, 1937 Guy A. Thompson, Trustee, of Missouri Pacific Railroad Company, Debtor.

—Six Hundred and No/100— Dollars in Full for the Above Account.

(Sign here) (Signed) Barker Duncan.

Witness: (Signed) O. L. Salter,

Witness: (Signed) R. C. Wolfe."

(R. 18-125.)

The Draft which the petitioner received after he had signed the above "device" is in words and figures as follows:

(Photostatic copy of draft, marked on the back "Ex. 3, W.A.S.")

200 Bks—50 Sets—1-28—W

Form 42-b

Trustee Account

Missouri Pacific Railroad Company

Office of Claims Attorney

(facsimile of seal:)

Missouri
Pacific
Lines

No Protest

Dated at St. Louis, Mo., August 13th, 1937. No. B 1736

At sight, pay to the order of Barker Duncan —Six Hundred and No/100— Dollars, account of partial payment in settlement for injuries sustained on or about April 10th, 1936, at Nevada, Missouri, when employed as a Roundhouse Laborer.

(Signed) O. L. Salter
Claim Agent"

(R. 20-127)

There was no dispute as the applicability of the Federal Employers' Liability Act, as the appellant admitted that the engine upon which the petitioner was working at the time he fell and received his injuries was undergoing light repairs and engaged in carrying interstate commerce (R. 13, 74).

The petitioner had been employed by the appellant as a roundhouse laborer at Nevada, Missouri, from July 1, 1934, until April 10, 1936, the date he received his injuries (R. 13-60). He was charged with the duty of supplying engines (R. 13-59). In connection with this work one of his specific duties was that of filling the lubricator on the engines with oil. On the night of April 9, 1936, the plaintiff went to work at nine o'clock p. m. His shift was from nine o'clock p. m. to six o'clock a. m. At about 1:20 a. m. April 10, 1936, engine No. 1429, which had made a run from Joplin to Nevada, was brought in and headed north on the turntable to be served preparatory to making its return trip to Joplin, Missouri (R. 74).

The plaintiff was ordered to fill the lubricator by his foreman (R. 14-29). The engine was run onto the turntable and the petitioner climbed up and placed his right foot on the rail of the turntable and his left foot on the jacket of the steam cylinder, and inserted the snout of the oil can in the hole at the top of the lubricator (R. 14-61). During which time there was no movement of the engine or turntable in any direction (R. 62). This was the customary method of oiling the lubricator (R. 12). The engine was headed north and the foreman in charge of the work desired to head the engine south and the petitioner was warned to get down from his position so that the turntable could be moved (R. 62). It was customary to warn employees when the turntable or engine was to be moved (R. 13-63-77). When the turntable and engine were stopped and headed south the plaintiff proceeded to climb upon the steps situ-

ated on the front of the engine and walked down the narrow running board to a position above the lubricator (R. 65). This running board was about twelve feet above the platform of the turntable (R. 64). The petitioner stopped to remove the oil can from the lubricator, and while he was in that stooped position, and without any warning whatsoever, the turntable and engine were moved with a sudden jerk to the east (R. 65). There was positively no warning given prior to the second movement (R. 65). The turntable was manipulated by an electric motor controlled by a lever (R. 12-27-70). There was an abundance of testimony that the turntable and engine would not move unless the lever was moved either to the right or to the left, depending upon the direction desired by the operator (R. 13-27-70). There was also testimony that the turntable could not be started in either direction without a jerk (R. 12-13). When the turntable and engine were suddenly moved with a jerk, without warning, the petitioner was thrown head first into the concrete pit a distance of eighteen feet (R. 66).

The petitioner suffered severe injuries. He was sent to the Missouri Pacific Hospital in St. Louis for approximately six weeks (R. 67). His leg and foot were badly injured and placed in a cast. In February of 1937, nearly a year after the petitioner had received his injuries, he had to undergo another serious operation to his foot (R. 67). The petitioner, as a result of his injuries and operations, was in the hospital several weeks at this time, and had to report back to the hospital once a month for nearly two years (R. 67). Petitioner was forced to remain on crutches for a long period of time (R. 67), and now walks with the aid of a cane (R. 67). He was rendered a hopeless cripple and disabled from ever performing railroad work (R. 68-69).

On August 13, 1937, sixteen months after the petitioner had received his injuries he was called into the claim department's offices in the Missouri Pacific Railroad Company

Building in St. Louis, and asked by the Claim Agent, Salter, if he could use some money (R. 14). The petitioner replied that he did need some money because of his long illness and the illness of his wife, who was then in the Missouri Pacific Hospital at St. Louis. She later died and the $600.00 was used for her burial expenses (R. 15-71). The petitioner was told at that time by Claim Agent Salter that his case was governed by the Missouri Workmen's Compensation Laws, and not by the Federal Employers' Liability Act (R. 15). The claim agent knew at the time that the petitioner's case was under the Federal Employers' Liability Act, as he later admitted (R. 33-34). The petitioner was further informed that there was approximately $600.00 due him at that time under the Missouri Workmen's Compensation Act (R. 15). The petitioner did not know which law governed his case, and relied entirely upon this statement of fact by Salter (R. 15).

The petitioner accepted the $600.00, but before receiving said sum the claim agent Salter required him to sign the unilateral "device" as shown by Exhibit "D" (R. 15-16), and a draft marked Exhibit "E", for $600.00, was delivered to petitioner (R. 16) . Petitioner was assured that Exhibit "D" was not a release (R. 16). After petitioner signed Exhibit "D" the appellant refused to make any effort to settle petitioner's claim (R. 16-72), although the petitioner made every effort to settle his claim with the appellant before he filed suit (R. 72).

The petitioner commenced his suit in the Circuit Court of Newton County on April 4, 1938, which was six days before the then existing statute of limitations prescribed by the Federal Employers' Liability Act had run (R. 4). The appellant knew when he made the loan to the petitioner on August 13, 1937, that only a few months remained until the petitioner's cause of action would be forever barred by the two year statute. He knew that the petitioner was a

permanent cripple, without money, and an unemployable industrially. He knew the petitioner had been unemployed for a period of sixteen months. Aware of these facts he suggested a loan to the petitioner, requiring him to sign the unilateral Exhibit "D", *supra*. No attempt was made by the appellant to *settle and compromise the petitioner's cause of action. No attempt was made to take a release* from the petitioner. It is respectfully urged that the intent and purpose of the appellant, by requiring the signing of Exhibit "D", when the loan was made, was to force the petitioner to take whatever additional sum, if any, the appellant would offer. The appellant, therefore, refrained from making any offer (R. 16-72), knowing that the petitioner could not repay the sum borrowed, and that the statute of limitations would run in the course of a few months, and before he could repay. The opinion of the Springfield Court of Appeals erred in holding that the "device" defeats petitioner's cause of action, because: First, Exhibit "D" is *not a release*; second, it is *not a compromise*.

No language is used in Exhibit "D" which can be construed to constitute a compromise and settlement or a release. The language used prohibits the construction made by the Springfield Court of Appeals that petitioner *compromised* and *settled* his cause of action. Exhibit "D" states that the said sum of $600.00 was paid "for living and other expenses *pending further developments* as to the extent and effect of said injuries and *negotiations for settlement of my claim* against said Trustee for said injuries."

Exhibit "E", which was the sight draft delivered to the petitioner at the time the loan was made to him, provided specifically that said sum was only "*partial payment in settlement for injuries sustained on April 10, 1936.*" The loan was made with no intention on the part of petitioner to settle by compromise (except at some future date), his

cause of action, nor was there any attempt made to take a release. The loan was made for the specific purpose of giving to the petitioner as he thought some money to defray "living expenses" *pending* a determination of the extent and *permanency of petitioner's injuries.* A reading of Exhibits "D" and "E" show clearly the erroneous holding of the Springfield Court of Appeals.

The "*device and scheme*" of appellant as a carrier of interstate commerce is without parallel. If such a "device" and concoction is permitted to be used by the appellant, who has many thousands of employees engaged in interstate commerce, it means that every injured employee so engaged will be loaned money and required to sign a like instrument, and that injured employee will never be able to file suit upon his cause of action created by the Federal Employers' Liability Act. It is so vicious in its ultimate result in circumventing the Federal Act, that all railroads in addition to the Missouri Pacific system will be using this instrument and "device," and with their attorneys will be heard singing the old chorus, "This is the way we long have sought and mourned because we found it not," and under Section 55, Title 45, U. S. C. A., this High Court should declare their "device" null and void and stop the chorus.

The Springfield Court of Appeals rendered its opinion on December 14, 1940. The petitioner filed a Motion for Rehearing on December 24, 1940, which was overruled December 31, 1940. Thereafter on January 28, 1941, the petitioner filed in the Supreme Court of Missouri his application for Writ of Certiorari, which was denied by the Supreme Court of Missouri on February 1, 1941. The petitioner, therefore, has exhausted all his remedies available to him save and except this Writ of Certiorari. The time for filing this application was extended by Mr. Justice Reed to and including May 12, 1941 (R. 147).

B.

Basis of Jurisdiction.

The judgment of the Springfield Court of Appeals of Missouri determined the rights claimed under the Federal Employers' Liability Act. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code Annotated, Title 28, Section 344, and particularly Section 344b thereof).

C.

Questions Presented.

Petitioner respectfully urges the following questions arising under the Federal Employers' Liability Act (April 28, 1908, Chapter 149, 35 Stat. 65, as amended August 11, 1909, c. 685, 53 Stat. 1404, 45 U. S. C. A. 51, 55, *et seq.*):

(1) Can the "device" marked Exhibit "D" be held to circumvent the Federal Employers' Liability Act and defeat petitioner's case created by that act when said "device" does in no wise constitute a *compromise* or *release?*

(2) Can the loan of $600.00 and the interest thereon not refunded before suit, be treated as a bar to petitioner's cause of action in view of the specific provision of Section 55 of the Federal Act, which provides that appellant shall receive such sum contributed as a set-off?

D.

Reasons Relied On for the Allowance of the Writ.

(1) Section 55, Title 45, U. S. C. A. provides that "any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common

carrier to *exempt* itself from *any liability created* by this chapter, shall to that extent be void." Petitioner contends that Exhibit "D" comes clearly within the purview of this provision, and is void because under the opinion of the Springfield Court of Appeals, the Appellant has exempted himself from all liability created by the Federal Act.

The Springfield Court of Appeals said that this instrument marked Exhibit "D" was "unique" (R. 124) in its character. The "uniqueness" is the subtle fraud and design to avoid the liability created by the Federal Employers' Liability Act. Neither this High Court nor any other court in this land has ever had an occasion to review such a "unique" instrument. There have been before this Court two classes of cases coming under Section 55, of the Federal Act. First, the cases involving *compromises* and *settlement;* second, cases involving agreements and contracts made by the carrier with the employee prior to his injury providing for benefits and indemnities.

This Court, as well as all Federal and State Courts, has universally encouraged compromises and settlements between the carrier and injured employees engaged in interstate commerce. The petitioner respectfully urges that the "device" and "unique" instrument marked Exhibit "D" when carefully read, does not constitute a *compromise* and *settlement*, as was the holding of the Springfield Court of Appeals. The "device" itself in unmistakable language prohibits any such interpretation. The "unique" instrument states, in paragraph 2, that the money loaned to the petitioner was "for living and other expenses pending further developments," and depending upon future "*negotiations for settlement.*" Exhibit "E" specifically states that the loan to the petitioner was only in "partial payment." Exhibit "D" does not provide that if the $600 is not returned, same shall be in full settlement of petitioner's claim, nor are there any words in this instrument

which could be taken to infer that the petitioner was signing a *release of his cause of action* under the Federal Employers' Liability Act. Therefore, the holding of the Springfield Court of Appeals that this "device" constituted a compromise and settlement is erroneous and is in direct conflict with the wording of the instrument itself.

Passing on the other class of cases involving benefit and indemnity contracts, this Court has held such contracts to be valid, in so far as they require payment of benefit or indemnity, but in all cases where the contracts, stipulations, regulations or instruments provide a forfeiture of the employee's right to sue upon his acceptance of benefit or indemnity, such forfeiture clauses have been held void under Section 55, of the Federal Act. Exhibit "D" provides for the payment of benefits for "living expenses" pending future negotiations for settlement. The joker and the 'uniqueness' is the provision that the petitioner can *never* file his suit until the money is repaid. This Court, speaking through Chief Justice Hughes, was first called upon to construe a contract for benefits and indemnities in *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 56 L. Ed. 911, 32 Sp. Ct. 603. Before this decision there existed in the State and Federal Courts of this country a wide diversity of opinion as to the validity of the forfeiture clauses of indemnity and benefit contracts. This Court again was called upon to pass upon a similar contract in *Chicago & Alton R. Co.* v. *Wagner*, 239 U. S. 452, 60 L. Ed. 379, 36 Sp. Ct. 135. The former case was decided in 1912; the latter in 1915. Since those two decisions were written by our eminent Chief Justice, this Court has never had occasion to review an attempt by any railroad company to circumvent the positive language of Section 55 of the Federal Act, until the 'unique' instrument in the instant case was concocted by the appellant. For nearly forty years the law has been well-settled as to the illegality of any 'device'

and 'scheme' to prohibit the employee's right to file his suit where no compromise has been made or release has been given. The importance of this Court's opinion upon this 'unique' 'device' marked Exhibit "D" will become a landmark in all future litigation involving the validity of schemes and devices to avoid liability under Section 55, U. S. C. A. If the opinion of the Springfield Court of Appeals becomes the law of this State, there is every reason to believe that other railroads will follow the precedent established thereby. Every employee of the appellant who has been stricken down by injury will be *loaned* money under the guise that the appellant wants to help him; then no attempt will ever be made to settle or compromise after the employee signs the like of Exhibit "D", but the railroad will demand a return of the money loaned which never can be made. The result will be that every injured employee engaged in interstate commerce will be at the mercy of the appellant and all other railroads using a similar 'device,' and will have to settle his claim at the price set by the appellant or other carriers. Exhibit "D" therefore, strikes at the very heart of the *liability* created by the Act. The uniform use of this instrument by the appellant now is eliminating all suits for personal injuries over its entire system, because the employee injured cannot repay. Therefore, settlements are being obtained at the price which the appellant is willing to advance to the injured employee at the time he is injured, or immediately thereafter. The magnitude and importance which attaches to this Court's decision, upon this 'unique' 'device' and scheme is imperative.

(2) Section 55, Title 45, U. S. C. A., also provides that, "such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or

the person entitled thereto on account of the injury or death for which said action was brought." The wording of Exhibit "D" clearly shows that the money loaned was in the form of a "relief benefit" because it states that the money was received by the petitioner "for living and other expenses."

By the terms of the verdict (R. 3-52-96) upon which the judgment was rendered the sum of $600 was credited together with six per cent interest from the date the money was borrowed until the date of the trial. The opinion of the Springfield Court of Appeals has completely ignored the above clear-cut language of Section 55. The Springfield Court not only ignored this positive language of the Section, but further held that the petitioner's cause of action was barred and ordered his case dismissed because he had not returned the money prior to instituting his suit.

The full import of the holding of the Springfield Court will be, whether this 'device' or some other 'device' is used, that a railroad can loan money under a stipulation that it must be returned before suit can be filed, thereby forever barring an injured employee's suit under the Act. Such holding not only is in direct conflict with the wording of this section of the Federal Act, but completely destroys the liability created thereunder. Petitioner respectfully urges that such holding, if permitted to stand, will prohibit all employees engaged in interstate commerce from bringing suit under Section 55, Title 45, U. S. C. A.

Wherefore, your petitioner prays that a Writ of Certiorari be issued under seal of this Court, directed to the Springfield Court of Appeals of Missouri, commanding said court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of *Barker Duncan, Respondent*, v. *Guy A. Thompson*, Trustee of the Missouri Pacific Railroad Company, a Corporation, No. 6194, to the end that this cause may be reviewed and

determined by this Court, as provided for in the statutes of the United States, and that the findings of said Springfield Court of Appeals to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1037

BARKER DUNCAN,

Petitioner,

vs.

GUY A. THOMPSON, TRUSTEE OF THE MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Springfield Court of Appeals in Barker Duncan, respondent, v. Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, a Corporation, appellant, is reported in 146 S. W. (2d) 112 (not yet reported in the official reports).

II.

Statement as to Jurisdiction.

The petitioner, in support of the jurisdiction of this Court to review the above cause on writ of certiorari, respectfully states:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon the Judicial Code, Section 237, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (U. S. Code, Title 28, Section 344), which provides in part as follows (Section 344b):

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment has been rendered by the highest court of a state in which * * * any title, right, privilege or immunity is specifically set up or claimed under any statute of * * * the United States."

B.

Date of Decree of State Court.

The judgment and decree sought to be reviewed was rendered on December 14, 1940 (R. 87-88). Petition for Rehearing was duly filed on December 24, 1940 (R. 106). On December 31, 1940, Motion for Rehearing was denied (R. 124). Thereafter, on January 28, 1941, the petitioner filed in the Supreme Court of Missouri his Application for Writ of Certiorari (R. 139), which was denied by the Supreme Court of Missouri on February 1, 1941 (R. 145), and

the judgment became final. The time for filing this application was extended by Mr. Justice Reed to and including May 12, 1941 (R. 147).

State ex rel. McGrew Coal Co. v. *Ragland*, 339 Mo. 452, 456, 458, 97 S. W. (2d) 113;

American Railway Express Co. v. *Levee*, 263 U. S. 19, 68 L. Ed. 140, 44 Sp. Ct. 11 (l. c. L. Ed. 143);

Moore v. *Fletcher*, 114 U. S. 127, 29 L. Ed. 117, 5 Sp. Ct. 799 (l. c. L. Ed. 117);

Bostwick v. *Brinkerhoff*, 106 U. S. 3, 27 L. Ed. 73, 1 Sp. Ct. 15 (l. c. L. Ed. 74);

Haseltine v. *Central National Bank*, 183 U. S. 130, 46 46 L. Ed. 117, 22 Sp. Ct. 49 (l. c. L. Ed. 118).

C.

Nature of Case and Ruling Below.

This was a suit for personal injuries under the Federal Employers' Liability Act. There is no issue in the case as to the applicability of the Federal Act since it was admitted in the trial that the parties were engaged in interstate transportation at the time the petitioner was injured (R. 13-74). There was an abundance of evidence tending to show that the petitioner received his injuries as a result of the defendant's negligence. It is further apparent that the petitioner's injuries were of a very severe nature, as was evidenced by the fact that he was forced to undergo extended hospital and medical treatment over a period of nearly two years. Sixteen months after petitioner received his injuries and while he was still in a helpless physical condition, unable to do any type of labor, and at a time when he had exhausted his financial resources, the appellant offered to loan or advance him $600 for "living and other expenses." Before the money was delivered peti-

tioner had to sign a *unilateral agreement* to return the $600 before instituting a suit, to recover for his injuries.

The appellant well knew that the petitioner would be unable to return the $300 within the remaining eight months before the statute of limitations would expire, forever barring an action for his injuries. Therefore, a few days before the expiration of the statute of limitations, petitioner had to file his suit without returning the $600. At the trial the jury found in favor of the plaintiff, assessing the amount of his damages, and then setting off the $600 loan, plus the interest thereon (R. 3-52-96). On appeal, the Springfield Court of Appeals reversed the judgment outright, and held the petitioner's cause of action was barred because he had failed to return the $600, as per the unilateral contract or 'device' (R. 106).

The petitioner, in his brief in the Springfield Court of Appeals, contended, as he now contends, that Exhibit "D", the 'unique' device requiring the return of the money, was void under Section 55, Title 45, U. S. C. A., which section provides that "any contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from *any liability* created by this chapter, shall to that extent be void." The Springfield Court of Appeals uses this significant language:

> "If Exhibit D is covered by this section of the Act, then it is no obstacle to plaintiff's recovery; the agreement is *void* without regard to fraud in its procurement, and, under the proviso clause to the section, defendant is only entitled to set off the $600. * * *" (R. 98).

However, the court says that it *does not think* that the "unique" device is within the terms of Section 55. This abortive conclusion of the Court of Appeals is based upon three erroneous premises.

First, that Section 55 applied only to contracts entered into *during* the time of employment or *prior* to the time of injuries (R. 100-101, 102-103). This ruling by the Springfield Court of Appeals is unsound in law, and wholly without precedent.

Second, the Court erred in holding that Exhibit "D" was a "compromise and settlement" (R. 100-101). When the money was loaned, there was no intention that it should be accepted as *full* and *complete settlement* of the cause of action. This fact is conclusively shown by the conversation between Salter, the appellant's claim agent, and the petitioner (R. 16, 93-96). It is also clearly shown by the wording of Exhibit "D" itself, which says the sums paid are for "living and other expenses pending further developments as to the extent and effect of said injuries and negotiations for settlement of my claim against said Trustee for said injuries." Exhibit "E", the draft which was delivered to the petitioner, said that it was for "partial payment." By the plain terms of these exhibits, the lower court erred in "*thinking*" Exhibit "D" constituted a "compromise and settlement."

Third, that Section 55 did not apply because the relationship of employer and employee had terminated (R. 100-102-103). Petitioner contends that his rights created by the Federal Act attached the instant the petitioner was injured. To exempt or deny those rights by the "unique" device is to destroy the intent and purpose of Section 55.

Certainly the lower court went far afield in a very peculiar way in order to arrive at the above conclusion. In short, the appellate court ruled that the appellant could, by loaning the petitioner $600, and at the same time requiring him to pay it back before filing a suit, thereby circumventing the positive language of Section 55, and defeating the intent of that section. Such a ruling, in effect, amounts to national legislation by inferior judicial interpretation.

D.

Cases Believed to Sustain Jurisdiction.

The holding of the Springfield Court of Appeals that petitioner's failure to return the $600 loaned him prior to filing suit constituted a bar to his cause of action, is, so far as we have been able to determine, without precedent, either in this State or in other States. However, it is clear that no one entitled to the benefits of the Federal Employers' Liability Act can be deprived thereof by a decision which is not reviewable by this Court.

The following decisions sustain petitioner's assertion of jurisdiction in this Court:

In *Seaboard, A. L. R. Co.* v. *Horton*, 233 U. S. 492, 34 Sp. Ct. Rep. 635, 58 L. Ed. 1062, speaking through Justice Pitney, the Court used this language:

> "There is a further motion to dismiss for want of jurisdiction, upon the ground that no right, privilege, or immunity under the employers' liability act was especially set up or claimed in the state court of last resort and by that court denied. But since that court sustained the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the act, which, if acceded to, would presumably have produced a verdict in its favor, and consequent immunity from the action this motion must be denied, upon the authority of St. Louis, I. M. & S. R. Co. *v.* McWhirter, 229 U. S. 265, 57 L. Ed. 1179, 33 Sp. Ct. Rep. 858." l. c. 1068 (L. Ed.).

Brady v. *Terminal Railroad Assoc.*, 303 U. S. 10, 58 Sp. Ct. 426, 82 L. Ed. 614;

Toledo Railroad Co. v. *Slavin*, 236 U. S. 454, 35 Sp. Ct. 306, 59 L. Ed. 671;

Chicago R. Co. v. *Devine*, 239 U. S. 52, 36 Sp. Ct. 27, 60 L. Ed. 140.

III.

Statement of the Case.

In the interest of brevity, petitioner does not here make a statement of the case, since the full statement has been given under heading "A" in the Petition for Writ of Certiorari.

IV.

Specification of Errors.

1. The Court erred in holding that the "device" marked Exhibit "D" constituted a compromise or release; and that it circumvented the Federal Employers' Liability Act, thereby defeating petitioner's cause of action created by the Act.

2. The Court erred in holding that the $600 loan and the interest thereon, not refunded before suit, barred petitioner's cause of action in view of Section 55, of the Federal Act, which provides that appellant shall receive such sum contributed as a set off.

V.

Summary of Argument.

(1) This Court will now allow the decision of any State Court to stand, which decision denies a *right* under the Federal Employers' Liability Act, and when reviewing State Court decisions under the Act, it is the duty of this Court to inquire not merely whether that right has by express terms been denied, but also whether such right has been denied in substance and effect.

Norman v. *B. & O. R. Co.*, 294 U. S. 240, 79 L. Ed. 885, 55 Sp Ct. 407;

Great Northern Ry. Co. v. *State of Washington*, 300 U. S. 154, 81 L. Ed. 573, 57 Sp. Ct. 397;

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 Sp. Ct. 579.

(2) The opinion as it now stands, allows the employer, after negligently injuring an employee, to defeat the cause of action under the Federal Employers' Liability Act, by loaning him money for "living and other expenses," conditioned that he would have to return it before filing suit, or suffer his action to be outlawed by the statute of limitations. This holding is made, notwithstanding the appellant, as shown by Exhibit "D", did not even obligate himself to "endeavor in good faith to adjust and settle" the petitioner's claim, although the "device" made that requirement of petitioner. On the other hand, in truth and in fact, the appellant refused to negotiate any settlement after the unilateral "device" was signed by the petitioner (R. 16-72). It is significant that no officer of the appellant ever signed Exhibit "D" making the instrument binding upon him as Trustee for the Railroad Company. The instrument, therefore, is strictly unilateral in character and should not be enforced in any court, especially so when appellant even refused to comply with the unsigned declarations attributable to him in the instrument.

The opinion holds that Exhibit "D" was of a "unique" character. Webster's Twentieth-Century Dictionary defines "unique" as, "being without a like or equal; unmatched; single in its kind or excellence." This device certainly does not have any equal, nor has any court ever before interpreted such an instrument to determine whether it is void under the Federal Employers' Liability Act. The petitioner contends, however, that this Exhibit is in direct

conflict with Section 55, of the Federal Act, and the following controlling cases:

Philadelphia, B. & W. R. Co. v. *Schubert*, 224 U. S. 603, 56 L. Ed. 911, 32 Sp. Ct. 589;

Chicago & Alton R. Co. v. *Wagner*, 239 U. S. 452, 60 L. Ed. 379, 36 Sp. Ct. 135;

Pittsburg, C. C. & St. Louis Ry. Co. v. *Miller*, 120 N. E. 706 (Ind. Sp.);

Hartman v. *Chicago, B. & Q. R. Co.*, 192 Mo. App. 271, 182 S. W. 148;

McAdow v. *Kansas City W. Ry. Co.*, 164 Pac. 177 (Kans. Sp.);

Larsen v. *Lewis-Sinas-Jones Co.*, 84 Pac, (2d) 296 (Calif. App.);

Rodell v. *Relief Dept. & Chicago, B. & Q. R. Co.*, 137 N. W. 174 (Minn. Sp.).

(3) Section 55, Title 45, provides:

> "*Contract, rule, regulation or device exempting from liability set-off.* Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought (Apr. 22, 1908, c. 149, Section 5, 35 Stat. 66)."

Exhibit "D", the 'unique device' by which the appellant attempts to exempt himself from liability on the petitioner's cause of action under the Federal Employers' Liability Act, should be declared void, and the $600 loaned to pe-

titioner as a relief benefit "pending negotiations for settlement of his claim" should be no bar to his suit.

Appellant was entitled to a return of this sum plus the interest thereon, as a set-off against petitioner's judgment, which was done by the jury (R. 3-52-96) under proper instructions of the court (R. 39-40). The holding, therefore, is in direct conflict with the following cases of this Court:

Chicago & Alton R. Co. v. *Wagner*, 239 U. S. 452, 60 L. Ed. 379, 36 Sp. Ct. 135;

Philadelphia, B. & W. R. Co. v. *Schubert*, 224 U. S. 603, 56 L. Ed. 911, 32 Sp. Ct. 589;

Hartman v. *Chicago, B. & Q. R. Co.*, 192 Mo. App. 271, 182 S. W. 148;

Giesecking v. *Litchfield & Madison*, 34 Mo. 672, 127 S. W. (2d) 700 (certiorari denied), 308 U. S. 583, 84 L. Ed. 488, 60 Sp. Ct. 104;

Bangor & Aroostook R. Co. v. *Jones*, 36 F. (2d) 886;

Hoffman v. *N. Y.-N. H. & H. R. Co.*, 74 Fed. (2d) 227, (certiorari denied) 294 U. S. 715, 79 L. Ed. 1248, 55 Sp. Ct. 513.

VI.

Argument.

(1) The petitioner urgently contends that his rights under the Federal Act have been denied him by this opinion. The issue as to whether Exhibit "D" barred the petitioner's suit was first pleaded by the appellant in his amended answer (R. 9-10-11). The clear-cut issue as to whether Exhibit "D" does or does not come under Section 55 of the Federal Act, was decided by the Springfield Court of Appeals, and Petitioner believes erroneously. The importance of a correct decision on the issue becomes imperative because the appellant is using this "device" in all cases of injuries to his employees engaged in interstate commerce. If this

opinion is allowed to stand, other carriers, if not already using a like "device" will adopt the same.

Under the decisions of this Court there can be no doubt of this Court's right to review this opinion. The same issue was raised in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 79 L. Ed. 885, 55 Sp. Ct. 407. Chief Justice Hughes used this language:

> "* * * The exercise of this power is illustrated by the provision of sec. 5 of the Employers' Liability Act of (April 22), 1908 (35 Stat. at L. 65, 66, chap. 149, U. S. C. title 45, sec. 55) relating to any contract the purpose of which was to enable a common carrier to exempt itself from the liability which the act created. Such a stipulation the Act explicitly declared to be void. * * *"
>
> l. c. 903 (L. Ed.)

The petitioner's judgment was reversed outright by the opinion of the Springfield Court of Appeals, and his case ordered dismissed. This was done upon the sole ground that the petitioner's cause of action was barred because he had not first repaid the $600 loan before filing suit. Chief Justice Hughes again said in *Norris* v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 Sp. Ct. 579:

> "* * * When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. * * *"
>
> l. c. 1077 (L. Ed.)

The Springfield Court of Appeals has held that the loan clause barred the petitioner's suit, and ordered a dismissal of his petition, and, therefore, he cannot now refile his case because the statute of limitations has long since run. This Court in reviewing this case should keep in mind the ultimate result obtained by the use of this 'device.' The result is an absolute denial of the petitioner's right to file his suit under the Federal Act, though it was admitted that both the appellant and the petitioner were engaged in interstate commerce at the time petitioner received his injuries. Petitioner confidently feels that this Court will not countenance the use of this loan agreement by the appellant, or any other carrier. In *Great Northern Ry. Co.* v. *Washington*, 300 U. S. 154, 81 L. Ed. 573, 57 Sp. Ct. 397:

> "• • • When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. • • •"
>
> l. c. 581 (L. Ed.)

Apology is made to this Court for asking a review where the amount involved is no more than $5,000, but the petitioner seeks a review because of the all importance of the question presented and the harm that has been done and will be done to all injured employees of carriers engaged in interstate transportation. If Exhibit "D" can be used universally by the railroads of the United States, compensation for injuries under the Federal Act will be the amounts of money which the carriers wish to loan the injured employees and not the compensation due by reason of the liability created by the Federal Employers' Liability Act.

(2) The lower court grounded its opinion upon the case of *Detwiler* v. *Lowden*, 269 N. W. (Minn. Sup.) 367, and held that "the exact question" (R. 103) in the instant case had been decided by the Minnesota Supreme Court. The facts are clearly distinguishable. There was no clause in the agreement in *Detwiler, supra*, attempting to prohibit the employee from filing his case under the Federal Employers' Liability Act. The clause only forbid the employee from filing his suit in any other jurisdiction than the one where the accident happened and Detwiler resided. He was working for the railroad company and lived in Kansas. He was injured in Kansas, and the clause which he signed was to the effect that he would resort only to the Kansas courts for his remedy under the Federal Act. There was absolutely no attempt made to limit or prohibit Detwiler from *filing his suit* against the railroad company in any of the Kansas courts. In the instant case, the proviso was inserted in Exhibit "D" providing that the petitioner *could never file his suit in any court in any state* until the $600 loan had been repaid. Therein lies the vital distinction between the two cases.

The petitioner wishes to make clear to this Court that he realizes that Section 55 does not make void contracts of settlements and compromises. This Court and other courts have always encouraged amicable settlements under the Federal Act. The petitioner stoutly denies that there is involved in the instant case any compromise or settlement. The wording of the "device" itself clearly shows that the parties did not intend to settle or compromise the petitioner's cause of action. Appellant made no attempt whatever to take a release from the petitioner. Exhibit "E", the draft drawn by the appellant, recites that the same was given only in "partial payment" (R. 20-121). Exhibit "D" expressly states that the loan was made to the petitioner as an advance for his "living expenses," pending further

negotiations of settlement. The Court erroneously treats Exhibit "D" as a compromise and settlement, and in discussing *Philadelphia B. & W. R. Co.* v. *Schubert*, 224 U. S. 603, 56 L. Ed. 911, 32 Sp. Ct. 558, states:

> "But there is no suggestion that the act was extended to cover not only contracts of employment but also *compromises* and *settlements* of completed and existing causes of action arising out of such employment." (R. 100-107.)

By this language the lower court held that the 'device' signed by the petitioner did constitute a compromise and settlement. The opinion further states (referring to *Schubert, supra*), "that case does not directly decide the question, but its reasoning would *seem* to indicate that the statute (Sec. 55) does not apply to a *compromise* and *settlement* of an existing and completed cause of action," (R. 101). Again the lower court refers to the instant case as one of *compromise* and *settlement*, and further holds that Section 55 is not broad enough to include contracts and agreements made after the liability attaches. This holding is in direct conflict with the following language used by Chief Justice Hughes in *Schubert, supra:*

> "• • • • That is the liability which the act defines and which this action is brought to enforce. It is to defeat that liability for the damages sustained by Schubert which otherwise the company would be bound under the statute to pay, that it relies upon his contract of membership in the relief fund, and upon the regulation which was a part of it. But for the stipulation in that contract, the company must pay; and if the stipulation be upheld, the company is discharged from liability. The conclusion cannot be escaped that such an agreement is one of immunity in the described event, and as such it falls under the condemnation of the statute." l.c. 916 (L. Ed.).

The lower court erroneously holds that because the "device" was entered into *after* the injury, Section 55 was not applicable. The liability created by the Federal Act *attached* the instant Duncan was injured by reason of the negligence of the appellant. The purpose of this "device" was to provide conditions preventing Duncan from filing a timely suit. The appellant knew that he would have to pay for petitioner's injuries because of the liability created by the Federal Act, and sought "immunity" from that liability by providing for repayment of the loan before suit could be brought. The appellant also knew that the petitioner would be unable to repay before the statute of limitations would run, and appellant went into the trial with confidence and filed his amended answer wherein he set up as a complete defense this "device" and alleged that "plaintiff could not and cannot lawfully file or maintain this suit, and action against defendant, and this action is premature and should be dismissed by the court," (R. 10-11). The conclusion cannot be escaped that the purpose and intent of the "device" was to be one of immunity for appellant, and a denial of the petitioner's existing rights given to him under the Federal Act. This is expressly prohibited by plain and unambiguous language used by our eminent Chief Justice in *Schubert, supra*, where he said:

> "• • • The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their *necessary operation* and *effect* in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."
>
> l.c. 916 (L. Ed.).

This Court is interested only in the *result* obtained by the use of Exhibit "D" either by the appellant or any other carrier. If by its use injured employees are forbidden to

file their suits under the Federal Act, such device or instrument certainly comes within the purview of Section 55, and should be declared void. The "purpose and intent" of the "device" was to bar the plaintiff's cause of action created by the Federal Act. This has been accomplished notwithstanding the petitioner did not dream that he was compromising or settling his case, and did not sign any release extinguishing his cause of action. No one can be in doubt as to the sinister and subtle purpose underlying the use of such a device as Exhibit "D". If the appellant wanted to settle and compromise the petitioner's claim, he should have come out in the open and above board, rather than resort to tricky and "unique" devices.

The lower court erroneously holds that the amendment of 1908, which changed the wording of Section 55, was not broad enough to include contracts made *after* the employee was injured and the liability had attached under the Act. The petitioner earnestly contends that regardless of when the agreement, stipulation, device or contrct is entered into, whether *before* or *after* the injury occurs, the same is prohibited by the language of Section 55, if said agreement, stipulation, device or contract in any manner *exempts* the carrier from the liability created under the Federal Employers' Liability Act. This Court and all Federal Courts have universally held, since the *Schubert* decision, *supra*, that any device, the "intent and purpose" of which is to relieve the carrier of liability created by the Federal Act, is absolutely void. The lower court realized and admitted that if this instrument was under the Federal Act it was one which the Act specifically condemns, and is void. However, in order to reverse the petitioner's judgment, the Court went out of its way to hold that Exhibit "D" constituted a *compromise* and *settlement*, and that Section 55 did *not* cover the case because the device was signed and entered into by the petitioner *after* he had received his injuries.

The language used in *Schubert, supra,* is convincing that Section 55 is broad enough to cover "*any kind of agreement*" or device whether entered into before or after the injury. Chief Justice Hughes said:

> "• • • It thus brings within its purview 'any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act.' It includes every variety of agreement or arrangement of this nature; and stipulations, contained in contracts of membership in relief departments, that the acceptance of benefits thereunder shall bar recovery, are within its terms. • • •"
>
> l.c. 916 (L. Ed.).

In *Schubert* case, *supra,* he received injuries on May 13, 1908. In 1905 he joined the railroad's "relief fund" membership, and contributed monthly $2.10 of his wages from October 18, 1905, to May 13, 1908. The railroad also contributed to this relief fund. As a member of that relief fund, Schubert agreed that the acceptance of benefits from that fund in case of injury should operate as a *release* and *satisfaction of all claims* against the Company. A stipulation in the application for membership provided that the acceptance of the benefits *would constitute a release from all claims for damages.* Schubert did, after being injured, accept $79 from these benefits, but later sued for his personal injuries under the Federal Act. The instrument was set up in answer as a complete bar. This Court held that Schubert was not precluded from filing his suit and affirmed his judgment for $7500.

In the *Duncan* case plaintiff received his injuries on April 10, 1936. Sixteen months later, on August 13, 1937, he signed Exhibit "D", which provided that the loan made was to be repaid *before* suit was filed. Nowhere in Exhibit "D" did it state that the acceptance of the $600 loan consti-

tuted a release or satisfaction, but on the other hand specifically provided that said sum was only a loan for "living expenses" pending "further negotiations for settlement."

This Court, in deciding the *Schubert* case, *supra*, did not hesitate to hold void the contract entered into by him, whereby he agreed to forfeit his right to sue for his personal injuries under the Federal Act in consideration of stipulated relief fund benefits. This contract, even though made prior to receiving his injuries, was at a time when he was physically fit, able to work, and to understand an instrument that was not tricky and full of jokers. Under this rule, established in the *Schubert* case and followed for nearly forty years (until the opinion of the Springfield Court of Appeals in the instant case) any contract was void which exempted the employer from liability created by the Federal Act.

Such a contract as in *Schubert*, *supra*, is not nearly so vicious or harmful as the device used by the appellant herein. Duncan had been stricken down by serious permanent injuries. He was unable to work and earn any money. He accepted the loan of $600 for "living expenses" the same as Schubert accepted the stipulated relief fund benefits. No compromise or settlement was attempted in the *Duncan* case, but in the *Schubert* case there was a plain proviso that the acceptance of the stiplated relief fund benefits *would release the carrier* from further liability. The opinion of the Springfield Court of Appeals has read into Exhibit "D" the proviso that Duncan's failure to repay the $600 loaned for living expenses constituted a "compromise and settlement" of the appellant's liability created by the Federal Act. If Exhibit "D" had embodied language so that Duncan, by accepting the $600 loan was releasing his rights under the Federal Act, there might be some justification for the opinion, but under the express terms of Exhibit "D" there is absolutely none.

The Supreme Courts of many of our States have universally held that any agreement attempting to relieve the carrier from the liability created by the Federal Act is void. In *Pittsburg, C. C. & St. L. Ry. Co.* v. *Miller*, 120 N. E. 706, the Supreme Court of Indiana, in construing Section 55, said:

> "It is apparent from an examination of this section of the statute that it was aimed at all contracts and devices whereby any railroad company attempted to relieve itself from liability to its employes, and that its purpose was to render such provisions void. * * *" l.c. 708.

No distinction has ever been made between contracts made before or after injury attempting to limit the liability created by the Act. In *Schubert, supra*, the employee accepted the benefits on a contract made before injury. In the instant case Duncan accepted the loan benefits after the injury. In *Schubert*, the carrier attempted to avoid liability by making the acceptance of the benefits a complete release. In *Duncan* the carrier attempted by the device marked Exhibit "D" to exempt itself of *all* liability by preventing a suit being filed without taking a release and *without stating in Exhibit "D"* that the acceptance of the benefits did constitute a compromise and settlement. In this respect the Duncan instrument should be more readily condemned by this Court than the Schubert contract.

The Supreme Court of Kansas, in *McAdow* v. *Kansas City Western Ry. Co.*, 164 Pac. 177, followed the rule as laid down by this Court in *Schubert, supra*, and used this language:

> "* * * The statute declares that all contracts for the payment of insurance, relief benefits, or indemnity, where the purpose is 'to enable any common carrier to exempt itself from liability created by this act, shall to that extent be void,' coupled with the provision al-

lowing a set-off for any sum paid or contributed by the carrier on account of the injury for which the action is brought. In Phila., Balt. & Wash. R. R. Co. *v.* Schubert, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911, it was decided that it made no difference whether the contract for the insurance was made with the actual intent of the parties to circumvent the statute, if the effect of the contract would operate so as to defeat the liability created by the statute. If Congress had intended to give the set-off in all cases, regardless of the character of the contract, appropriate words would doubtless have been found to express that intent. As we construe the statute, the proviso applies only to contracts which enable the carrier to relieve itself of further liability." l. c. 181

In determining whether a contract made between the carrier and the employee comes within the purview of Section 55 and should be declared void, the essential element to be considered is, whether the carrier by that contract is attempting to exempt itself from liability that will or has already attached under the Federal Act. In the instant case, it attached when Duncan was injured, and the carrier attempted to completely wipe out that liability by preventing the employee from filing suit upon his claim.

The California Court of Appeals had before it the same question in *Larsen* v. *Lewis-Sivas-Jones Co.*, et al., 84 Pac. (2d) 296. This language was used approving the *Kansas* case, as well as this Court's opinion in *Schubert, supra:*

"Section 55, title 45 U. S. C. A. (Railroads), provides that 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *.'

"The effect of this section is to make void an agreement between an employee and employer which releases the employer from any liability to the employee for its negligence. (Case Cited) If the contract op-

> erates so as to defeat the statutory liability, it is void, regardless of the intent of the parties. Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911; McAdow *v.* Kansas City Western R. Co., 1917, 100 Kan. 309, 164 P. 177, L. R. A. 1917E, 539." l. c. 299

The petitioner earnestly contends that the appellants, by using the device marked Exhibit "D", is circumventing the liability created under the Federal Employers' Liability Act. The amendment passed by the United States Congress in 1908 included all contracts which exempted or tended to exempt the carrier from liability created by the Federal Act. Whether those contracts are made *before* or *after* the injury is immaterial. If the liability once attaches, Section 55 is broad enough to cover and does cover every "contract, rule, regulation or device whatsoever the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this charter, * * *." It is absurd for the appellant to contend in the instant case that he has not exempted himself from the liability which attached when Duncan received his injury.

In *Chicago & Alton R. Co.* v. *Wagner*, 60 L. Ed. 379; 239 U. S. 452, 36 Sp. Ct. 135, this Court held that the liability attached when the injury was received. Speaking through Chief Justice Hughes the Court said:

> "* * * The liability created by the act arose when the injury was received, and it is clear that if it was received while Wagner was engaged in interstate commerce, his acceptance of benefits under the relief contract would not bar an action against his employer. * * *." l. c. 382 (L. Ed.)

The appellant has obtained the result which he sought to obtain by subterfuge and trickery. The appellant knew that he was settling Duncan's case without taking a re-

lease and without stating in the device marked Exhibit "D" that a compromise and settlement was being made. The viciousness of such a device is readily apparent. Every lawyer knows that the railroad in using such a 'device' with its injured employees will have all of them at its mercy. Petitioner confidently feels that this Court will, as it did in 1912, when deciding the *Schubert* case, strike down this attempt of the appellant to circumvent the liability created by Congress in passing the Federal Employers' Liability Act and the amendments thereto.

(3) Section 55, Title 45, U. S. C. A. also provides:

> "* * * That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. (Apr. 22, 1908, c. 149, sec. 5, 35 Stat. 66.)"

The appellant received his $600 and interest thereon as a set-off by the jury's verdict (R. 3-52-96), as per the instruction of the trial court (R. 39-40). Under the provision of Section 55, *supra*, was the $600 loaned the petitioner a "relief benefit"? To determine this question the language used in Exhibit "D" must be examined. It states that, "said sums are paid to me at my request for living and other expenses." Without doubt the money was loaned to the petitioner as a relief benefit for his living expenses. The Exhibit further provides that the money was loaned "pending further developments as to the *extent* and *effect* of *said injuries* and negotiations for settlement of my claim against said Trustee for *said injuries*."

We find the two essential elements present in Exhibit "D" which clearly bring this loan or "relief benefit" under the proviso of Section 55, viz:

(a) The money was loaned by the appellant to the petitioner, who was an injured employee and had been out of work for a period of sixteen months, and the extent of his injuries on August 13, 1937, when the loan was made, had not yet been determined.

(b) The money was loaned the petitioner as a "relief benefit" on account of an injured employee.

The language used throughout Exhibit "D", as well as the draft drawn in favor of the petitioner clearly shows that the money was paid on 'account of the injuries' received by petitioner. Exhibit "E", the sight draft, stated the "$600, account of partial payment in settlement for *injuries sustained* on or about April 10, 1936, at Nevada, Missouri, when employed as a roundhouse laborer." When petitioner received this draft, and signed Exhibit "D", no attempt was made by the appellant to compromise or settle the petitioner's cause of action under the Federal Act. Appellant made no attempt to take a release from the petitioner, but the loan was made solely upon the basis that petitioner needed some money for relief expenses.

On August 13, 1937, the extent of his injuries had not yet been determined to make possible negotiations for a settlement. Herein lies the crux of the sinister and 'unique' purpose which the appellant had in mind when the money was loaned. The appellant did not then, nor does he now, want the $600 repaid because the device has now ripened into a complete compromise and release by the opinion of the Springfield Court of Appeals.

The opinion of the Springfield Court of Appeals is clearly erroneous in holding that this 'relief benefit' of $600 made to the petitioner was not a proper set-off in the trial court.

The appellant's loan of $600 and the interest thereon was returned as a set-off by the verdict and judgment rendered herein.

The opinion, therefore, is in direct conflict with the holding of this Court in *Chicago & A. R. Co.* v. *Wagner*, 239 U. S. 452, 60 L. Ed. 379, 36 Sp. Ct. 135:

> "There was thus no misconstruction of the Federal act in holding that the contract between Wagner and the Burlington company, and his acceptance of benefits thereunder, did not release the latter from liability for the injury, and that under sec. 5 that company, assuming it to be a joint tort feasor, would merely have the right to set off any sum which it had contributed to the benefits received; and there was no denial by the state court of any Federal right in declining to treat the relief contract, and the acceptance of benefits, as a discharge of the Alton company." l. c. 382 (L. Ed.)

The petitioner respectfully urges that the lower court committed two grave errors in its opinion. First, it erred in holding that Exhibit "D" did not come within the purview of Section 55 and void. Second, the Court erred in holding that the loan or relief benefit could not be made a set-off against the petitioner's judgment under the proviso of Section 55.

Respectfully submitted,

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